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Transnational Access to Justice

Christopher Whytock

cwhytock@law.uci.edu

University of California, Irvine ~ School of Law

TRANSNATIONAL ACCESS TO JUSTICE

Christopher A. Whytock*

The study of access to justice has long had a strong domestic focus. This Article draws attention to a different aspect of access to justice, one that has, so far, received comparatively little attention: transnational access to justice. This Article presents a typology of transnational access-to-justice problems, explains why those problems are distinctive and important to understand and address, and proposes an agenda for further transnational access-to-justice research. Part I defines the concept of transnational access to justice. Part II develops a typology of transnational access-to-justice problems, including different types of transnational access-to-justice gaps and conflicts. It shows that although some transnational access-to-justice problems are similar to those that arise in domestic disputes, they tend to be exacerbated by the transnational context. Other transnational access-to-justice problems are distinctive because they result from the decentralized structure of the global legal system and generally do not arise in domestic disputes. Part II also shows that transnational access to justice is affected by international institutions in ways that domestic access to justice ordinarily is not. Part III argues that another reason to focus on access to justice from a transnational, as well as a domestic perspective, is that access to justice is a global governance problem, not only a domestic governance problem. By incorporating the perspective of parties in transnational disputes, and by situating access to justice in the context of the global legal system and global governance, this Article aims to contribute to a more complete understanding of the range of access-to-justice problems that exist in the world and how those problems might be mitigated.

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* Professor of Law and Political Science, University of California, Irvine; Associate Reporter, Restatement (Third) of Conflict of Laws; Member, US State Department Advisory Committee on Private International Law. The author thanks Pamela Bookman, Maya Steinitz and Shauhin Talesh for their valuable comments on earlier drafts of this Article, and Jaime Allgood and Lucy Stanley, as well as Jessica Pierucci of the UC Irvine Law Library, for excellent research assistance.

INTRODUCTION

The study of access to justice has long had a domestic focus. International organizations (both governmental and non-governmental) promote access to justice in States[1] around the world.[2] In addition, there are numerous in-depth academic studies considering access to justice in different States' domestic legal systems,[3] as well as important cross-national comparative research on access to justice.[4] There also is work in related fields, including human rights and private

1. In international law, "State" is a term of art that is generally used instead of "nation" or "country." Specifically, "a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987). In this Article, the term "State" has its international legal meaning, and does not refer to an individual state of the United States.

2. *See, e.g.*, Julinda Beqiraj & Lawrence McNamara, *International Access to Justice: Barriers and Solutions (Bingham Centre for the Rule of Law Report)*, INT'L BAR ASS'N (Oct. 2014), https://www.biicl.org/documents/485_iba_report_060215.pdf?showdocument=1.

3. *See, e.g.*, SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT (2015) (United States); Sherie Gertler, *Legal Aid and International Obligation: Ensuring Access to Justice in the Liberian Context*, 45 COLUM. HUM. RTS. L. REV. 955 (2014) (Liberia); Meena Jagannath, Nicole Phillips & Jeena Shah, *A Rights-Based Approach to Lawyering: Legal Empowerment As an Alternative to Legal Aid in Post-Disaster Haiti*, 10 NW. U. J. INT'L HUM. RTS. 7 (2011) (Haiti). For an overview of other national studies, see Roderick A. MacDonald, *Access to Civil Justice*, *in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 492, 498–501 (Peter Cane & Herbert M. Kritzer eds., 2010).

4. *See, e.g.*, ACCESS TO JUSTICE AND LEGAL AID: COMPARATIVE PERSPECTIVES ON UNMET LEGAL NEED (Asher Flynn & Jacqueline Hodgson eds., 2017). The seminal example is the monumental multi-volume comparative access-to-justice series edited by Mauro Cappelletti and Bryant Garth. *See, e.g.*, Mauro Cappelletti & Bryant Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective—A General Report*, *in* 1 ACCESS TO JUSTICE: A WORLD SURVEY (Mauro Cappelletti & Bryant Garth eds., 1978).

international law, that has important implications for access to justice beyond purely domestic contexts.[5]

Nevertheless, work on access to justice has been predominantly domestic in three ways: First, it has focused on access-to-justice problems from the perspective of persons in domestic disputes. Second, it has emphasized access to justice in particular domestic legal systems.[6] Third, it has understood access to justice as a problem of domestic governance.[7]

This Article looks beyond domestic access to justice. Specifically, it draws attention to an aspect of access to justice that so far has largely escaped systematic analysis: *transnational access to justice*—that is, access to justice for persons in transnational disputes.[8] As this Article argues, transnational access-to-justice problems are important and distinctive. To understand the full range of access-to-justice problems that exist in the world, access to justice studies must include the perspective of parties in transnational disputes, understand these problems in the context of the global legal system, and treat them as problems of global governance, not only domestic governance.[9]

5. *See, e.g.*, JAMES J. FAWCETT, MÁIRE NÍ SHÚILLEABHÁIN & SANGEETA SHAH, HUMAN RIGHTS AND PRIVATE INTERNATIONAL LAW (2016) (discussing access to justice in context of European private international law); DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (3rd ed. 2015) (discussing the right to a remedy for human rights violations); AM. ASS'N OF PRIV. INT'L L., *Principles on Transnational Access to Justice* (2016), http://www.asadip.org/v2/wp-content/uploads/2018/08/ASADIP-TRANSJUS-EN-FINAL18.pdf (last visited Aug. 2, 2019) (proposing inter-American principles of civil procedure aimed at ensuring transnational access to justice).

6. *See, e.g.*, works cited *supra* in notes 2 and 3.

7. *See, e.g.,* Michael M. Karayanni, *The Extraterritorial Application of Access to Justice Rights: On the Availability of Israeli Courts to Palestinian Plaintiffs*, *in* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 210, 218 (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2014) (arguing that "[t]he most fundamental value…is achieving access to justice as a basic tool in a participatory democracy" and that "[t]o have access to justice means to belong to the realm of societal decision; to be excluded from one is to be denied the other"). *See also* UNITED NATIONS DEV. PROGRAMME, ACCESS TO JUSTICE 3 (Sept. 3, 2004), http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf ("There are strong links between establishing democratic governance, reducing poverty and securing access to justice.").

8. *See* Jacques Ziller, *Administering Global Governance: The Issue of Access to Justice*, *in* THE WORLD WE COULD WIN: ADMINISTERING GLOBAL GOVERNANCE 38, 42–43 (Geraldine Fraser-Moleketi ed., 2005) ("L'étude de l'accès à la justice dans des cadres régionaux et mondiaux reste à mener à bien."). There have, however, been several prior efforts to draw attention to transnational access to justice. *See, e.g.*, Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444 (2011); Antoni Pigrau & Antonio Cardesa-Salzmann, *Seeking Justice in a Multipolar World: Reflections on a Global Standard of Access to Justice for Transnational Litigation*, Presented at Research Forum of the Am. Soc'y of Int'l L. (Oct. 21, 2012); AM. ASS'N OF PRIV. INT'L L., *supra* note 5 at preface and art. 4.9.

9. *See* Javier L. Ochoa Munoz, *Transnational Access to Justice and Global Governance (Introductory Comments to the ASADIP Principles on Transnational Access To Justice)*, 20 REVISTA DE DIREITO BRASILEIRA 336 (2018) (abstract) ("Access to justice today is one of the most important human rights, which is not limited to the scope of local legal relations, but also involves transnational

The Article develops this argument in three parts. Part I defines the concept of transnational access to justice. Part II presents a typology of transnational access-to-justice problems—including different types of transnational access-to-justice gaps and conflicts—and points out their distinguishing features. It shows that some transnational access-to-justice problems are similar to those that arise in domestic disputes but tend to be exacerbated by the transnational context. Other transnational access-to-justice problems are distinctive because they are due to the decentralized structure of the global legal system and generally do not arise in domestic disputes. Part II also explains how transnational access to justice is affected by international institutions in ways that domestic access to justice typically is not. Part III argues that another reason to focus on access to justice from a transnational as well as domestic perspective is that access to justice is a global governance problem, not only a domestic governance problem. International law and international organizations recognize and aim to promote access to justice, and transnational access to justice can improve the quality of global governance. For all of these reasons, it is important for research on access to justice to be attentive to transnational access-to-justice problems. The Article concludes by proposing an agenda for further transnational access-to-justice work.

By incorporating the perspective of parties in transnational disputes and situating access to justice in the context of the global legal system and global governance, this Article aims to foster a more comprehensive understanding of the range of access-to-justice problems that exist in the world and how those problems might be mitigated.

I.
THE CONCEPT OF TRANSNATIONAL ACCESS TO JUSTICE

This Article defines "transnational access to justice" as access to justice for persons in transnational disputes.[10] Transnational disputes are disputes that have connections—personal or territorial—to more than one State.[11] A personal connection is an affiliation between a State and a person involved in, or affected by, a dispute.[12] Examples of personal connections include nationality, citizenship, habitual residence, domicile, statutory seat, or principal place of business. A

legal relations.") (https://go.gale.com/ps/anonymous?id=GALE%7CA598536992&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=2237583X&p=AONE&sw=w).

10. *Cf*. AM. ASS'N OF PRIV. INT'L L. *supra* note 5, at preface and art. 4.9 (referring in preface to "transnational private litigation," including "judicial proceedings involving foreign elements").

11. *See* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) [hereinafter Whytock, *The Evolving Forum*] ("By definition, transnational disputes have connections to more than one country. These connections may be territorial when the activity or its effects touch the territory of more than one country; or they may be based on legal relationships between a country and the actors engaged in or affected by that activity, such as citizenship.").

12. *Id.*

territorial connection is a connection between a dispute and the territory of a State.[13] For example, a territorial connection exists with the State where an event giving rise to the dispute occurred; where a person or thing that is a subject of, or affected by, the dispute is located; or where the court adjudicating the dispute is located.[14] From the perspective of the forum State—the State where a dispute is being resolved—the dispute is transnational if it has a personal or territorial connection to at least one foreign State.

There is no universally agreed upon definition of access to justice,[15] and this Article does not attempt to conclusively settle that definition. Most definitions of access to justice, however, incorporate one or more of the following dimensions:

Formal Legal Dimension: Access to justice requires that persons have a right of access to a court where they can bring legal claims.[16] Some commentators argue that other dispute resolution institutions may be a satisfactory, or even preferable, alternative to court access, or at least a beneficial complement to court access.[17] Others argue that in some contexts, such as mandatory arbitration of consumer disputes, alternative dispute resolution methods can create barriers to access to justice.[18] This Article focuses on courts, without taking a position on

13. *Id.*

14. These connections are similar to the territorial and personal connections that are commonly relevant in private international law (or "conflict of laws") analysis. *See* PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS § 1.1, at 1, § 17.85, at 994 (6th ed. 2018).

15. PIERRE SCHMITT, ACCESS TO JUSTICE AND INTERNATIONAL ORGANIZATIONS: THE CASE OF INDIVIDUAL VICTIMS OF HUMAN RIGHTS VIOLATIONS 91 (Edward Elgar ed., 2017) ("[T]here is no standardized concept of the access to justice and the concept of 'access to justice' tolerates a broad range of definitions.").

16. *See* Cappelletti & Garth, *supra* note 4, at 6; Francesco Francioni, *The Rights of Access to Justice Under Customary International Law*, *in* ACCESS TO JUSTICE AS A HUMAN RIGHT 1 (Francesco Francioni ed., 2007) ("In a general manner [access to justice] is employed to signify the possibility for the individual to bring a claim before a court and have a court adjudicate it.").

17. *See, e.g.*, DEBORAH L. RHODE, ACCESS TO JUSTICE 21 (2004) (including alternative dispute resolution as having potential to improve access to justice); Beqiraj & McNamara, *supra* note 2, at 8 ("[access to justice] embraces access to dispute resolution mechanisms as part of justice institutions that are both formal (i.e., institutions established by the state) and informal (i.e., indigenous courts, councils of elders and similar traditional or religious authorities , mediation and arbitration)."); Peter Chapman & Alejandro Ponce, *How Do We Measure Access to Justice? A Global Survey of Legal Needs Shows the Way*, OPEN SOC'Y JUST. INITIATIVE (Mar. 16, 2018), https://www.opensocietyfoundations.org/voices/how-do-we-measure-access-justice-global-survey-legal-needs-shows-way (last visited Aug. 2, 2019) ("We must challenge the misconception that courts and lawyers are the solution to access-to-justice issues. We should support flexible systems of legal assistance that meet people where they are, to help secure outcomes that are more just. Nonlawyers and community-based paralegals can play a critical role.").

18. *See generally* Anna Nylund, *Access to Justice: Is ADR a Help or Hindrance?*, *in* THE FUTURE OF CIVIL LITIGATION: ACCESS TO COURTS AND COURT-ANNEXED MEDIATION IN THE NORDIC COUNTRIES 325–44 (Laura Ervo & Anna Nylund eds., 2014); STASZAK, *supra* note 3, at chap. 3 (discussing arbitration and access to justice); Carrie Menkel-Meadow, *Practicing "In the Interests of Justice" in the Twenty-First Century: Pursuing Peace As Justice*, 70 FORDHAM L. REV. 1761, 1770

the ways that other types of dispute resolution institutions may contribute to access to justice.

Institutional Dimension: Access to justice does not merely depend on a right of court access, but also on a right of access to a court that is independent, impartial, and established by law.[19]

Procedural Dimension: Access to justice requires procedural fairness. Without procedural fairness, courts cannot provide effective access to justice.[20] Procedural fairness is commonly said to require conditions such as adequate notice, a reasonable opportunity to be heard, procedural equality, adversarial proceedings, a public hearing, a reasoned decision, a judgment in a reasonable time, and enforcement of judgments.[21]

Practical Dimension: Beyond the formal legal, institutional, and procedural dimensions, there are practical requirements that must be satisfied to make access to justice effective.[22] These practical requirements include: awareness of one's legal rights and defenses (including the right of access to justice itself), affordability of access, and availability of legal assistance.[23] Some commentators

(2002) (noting "distortions of the 'ADR' process that inhibit . . . access to justice and fairness," such as mandatory arbitration clauses in employment, health care and consumer contracts, but proposing nuanced understanding based on "the reasons for when and how justice is delivered in different settings (and sometimes differentially for different people).").

19. *See* Francioni, *supra* note 16, at 3 ("[T]he term [access to justice] would normally refer to the right to seek a remedy before a court of law or a tribunal which is constituted by law and which can guarantee independence and impartiality in the application of the law."); SCHMITT, *supra* note 15, at 107–13 (identifying independence, impartiality and establishment by law as among the institutional requirements of the right of access to justice). *Cf.* CHARLES T. KOTUBY JR. & LUKE A. SOBOTA, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS 157-97 (2017) (identifying judicial impartiality and judicial independence as principles of international due process).

20. *See* FAWCETT, SHÚILLEABHÁIN & SHAH, *supra* note 5, at 63 ("[T]he right of access to a court would be rendered ineffective if the process by which a dispute was determined was deficient.").

21. *See id.* at 67–72 (identifying equality of arms, adversarial proceedings, a reasoned decision, a public hearing, judgment in a reasonable time, and execution of judgments as among the requirements for access to justice under Article 6 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights); SCHMITT, *supra* note 15, at 114–15 (identifying a public hearing, equality of arms, a judgment in a reasonable time, and enforcement of judicial decisions as among the procedural requirements for access to justice). *Cf.* KOTUBY & SOBOTA, *supra* note 19. Regarding procedural equality ("equality of arms"), see De Haes and Gijsels v. Belgium, Eur. Ct. H.R. (ser. A.) at 53 (1998) ("The Court reiterates that the principle of equality of arms—a component of the broader concept of a fair trial—requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.").

22. *See* Cappelletti & Garth, *supra* note 4, at 7–9. *See also* FAWCETT, SHÚILLEABHÁIN & SHAH, *supra* note 5, at 62 (noting the following about the right of access to justice under Article 6 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights: "As regards access to a court in fact, there should be no practical obstacles to have a dispute determined. This has had some important consequences for the provision of legal assistance and legal aid.").

23. *See* Cappelletti & Garth, *supra* note 4, at 12 ("[I]t is certainly clear that high costs, to the extent that one or both of the parties must bear them, constitute a major access-to-justice barrier."); Tom Cornford, *The Meaning of Access to Justice*, *in* ACCESS TO JUSTICE 27, 39 (Ellie Palmer, Tom

have added that practical inequalities between the parties—such as differences in resources and legal experience—can be a barrier to effective access to justice, even if other practical requirements are met.[24]

Substantive Legal Dimension: Finally, some scholars adopt a more expansive concept of access to justice. They argue that access to justice depends on substantive law that is capable of producing just outcomes.[25] On the one hand, such a conception runs the risk of losing analytical distinctiveness by equating itself with more general concepts of justice.[26] Moreover, the inclusion of a substantive legal dimension goes beyond the definition of access to justice in several international human rights instruments.[27] On the other hand, it is difficult to separate access to justice from the possibility of a just outcome. Outcomes not only depend on formal, institutional, procedural, and practical factors, but also on substantive law.[28] Without the possibility of a just outcome, access to justice

Cornford, Audrey Guinchard, & Yseult Marique eds., 2016) ("Properly understood, access to justice entails a right of equal access to legal assistance for every citizen."); RHODE, *supra* note 17, at 20 ("[T]hose who need legal services, but cannot realistically afford them, should have access to competent assistance."); Beqiraj & McNamara, *supra* note 2, at 8 (access to justice requires "awareness and understanding" of access-to-justice rights).

24. *See* Cappelletti & Garth, *supra* note 4, at 10 ("Optimal effectiveness…could be expressed as complete 'equality of arms'—the assurance that the ultimate result depends only on the relative legal merits of the opposing positions, unrelated to differences which are extraneous to legal strength and yet, as a practical matter, affect the assertion and vindication of legal rights. This perfect equality, of course, is utopian…the differences between parties can never be completely eradicated. The question is how far to push toward the utopian goal, and at what cost."); RHODE, *supra* note 17, at 5–6 (noting that "[i]n most discussions, 'equal justice' implies equal access to the justice system" but reality is that "[t]he role that money plays in legal, legislative, and judicial selection processes often skews the law in predictable directions"); Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 FORDHAM L. REV. 1543, 1549 (2002) ("access to an adversarial process is not necessarily access to justice, particularly in a system where money often matters more than the merits"). *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

25. *See* David Goddard, *The Judgments Convention—The Current State of Play*, 29 DUKE J. COMP. & INT'L L. 473, 476 (2019) ("Access to justice means access to practical justice; to just outcomes that are given effect."); Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 872–73 (2009) (emphasizing that "the substance of legal rights and remedies" is an important aspect of access to justice).

26. I thank Maya Steinitz for emphasizing this point.

27. *See, e.g.*, FAWCETT, SHÚILLEABHÁIN & SHAH, *supra* note 5, at 67 (the right to a fair hearing entailed by the concept of access to justice recognized by Article 6 of the European Convention on Human Rights "is to be assessed in terms of process and not outcome; that is, the right to a fair trial does not protect substantive fairness"); SHELTON, *supra* note 5, § 2.2 (distinguishing "access to justice" from "substantive redress").

28. *See* Stefan Wrbka, Steven Van Uytsel & Mathias M. Siems, *Access to Justice and Collective Actions*, *in* COLLECTIVE ACTION: ENHANCING ACCESS TO JUSTICE AND RECONCILING MULTILAYER INTERESTS? 1, 1–2 (Stefan Wrbka, Steven Van Uytsel, & Mathias Siems eds., 2012) ("The term 'access to justice' itself consists of two parts, 'access' and 'justice,' which – when read together – can be seen as a kind of abbreviation. 'Access' often comes together with 'equal' or 'effective'. It embodies the older, more technical and procedural side of the overall concept: It is the question of enabling those in need to pursue their legal interests. 'Justice' on the other hand, has a more result-oriented meaning

would be illusory; it would be unable to actually provide justice even if formal, institutional, procedural, and practical requirements were satisfied. Thus, as one commentator puts it, "every discussion [of access to justice] assumes a goal called 'justice.'"[29]

Although this Article does not attempt to settle the definition of access to justice, it posits that however defined, its dimensions are essentially the same for domestic access to justice and transnational access to justice. In other words, insofar as access to justice for parties in domestic disputes depends on the satisfaction of formal legal, institutional, procedural, practical, and substantive law requirements, access to justice for parties in transnational disputes also depends on satisfaction of these requirements.

However, as the rest of this Article argues, even if the domestic and transnational contexts do not imply different definitions of access to justice, they do imply different potential barriers to access to justice and a variety of distinctive transnational access-to-justice problems that require specially tailored solutions.

II.
A TYPOLOGY OF TRANSNATIONAL ACCESS-TO-JUSTICE PROBLEMS

Transnational disputes raise many of the same access-to-justice challenges raised by domestic disputes; but transnational access-to-justice problems differ from purely domestic access-to-justice problems in at least three ways. First, the transnational character of a dispute can exacerbate certain access-to-justice problems that also exist in domestic disputes. Second, there are some distinctive barriers to access to justice that arise in transnational disputes because of the decentralized structure of the global legal system and the heterogeneity of national legal systems. Third, transnational disputes may involve international institutions, either as parties or as potential providers of access to justice, in ways that are unlikely in most purely domestic disputes.

A. Exacerbated Access-to-Justice Problems

First, domestic disputes and transnational disputes share some access-to-justice problems. However, the transnational context tends to exacerbate them.

which should be reached through equal or effective access: The outcome of the procedure should be 'just' or at least be made on fair (i.e. unbiased grounds)."). This link between access to justice and the possibility of a just outcome is implicit in the US forum non conveniens doctrine. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981) ("At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction . . . . In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.").

29. Lawrence M. Friedman, *Access to Justice: Social and Historical Context*, *in* 2 ACCESS TO JUSTICE: PROMISING INSTITUTIONS 5, 5 (Mauro Cappelletti & John Weisner eds, 1978).

Lack of Impartiality. Access to justice requires access to an impartial court.[30] Even in the resolution of purely domestic disputes, impartiality is sometimes lacking, thus posing a barrier to access to justice. But this barrier will often be greater in transnational disputes. In addition to biases that exist in purely domestic disputes, transnational disputes raise the possibility of biases—whether explicit or implicit—in favor of domestic parties or against foreign parties.[31] Insofar as those biases exist, they undermine impartiality, and thus access to justice, in transnational disputes.

Lack of Awareness and Understanding of Rights. To be effective, access to justice requires that persons are aware of, and understand, their legal rights.[32] Lack of awareness and understanding are barriers to access to justice in domestic disputes, but are likely to be an even greater problem in many transnational disputes.[33] First, the multistate connections that define transnational disputes may create uncertainty about which State's law applies. Ordinarily, the degree of uncertainty is lower in purely domestic disputes.[34] Second, even if a party knows which State's law applies, if it is not the law of the party's own State (foreign law, from that party's perspective), the party will likely have less understanding of that law. Third, some transnational disputes will raise issues under international law or be resolved in international courts. Typically, disputants will have less awareness and understanding of international law and the procedures of international courts than that of their own law and courts.

30. As noted above, access to non-court dispute resolution processes may also satisfy this requirement under some circumstances. *See supra* Part I.

31. *See* Utpal Bhattacharya, Neal Galpin & Bruce Haslem, *The Home Court Advantage in International Corporate Litigation*, 50 J. L. & ECON. 625, 629 (2007) (arguing that American courts are biased against foreign corporations in international business disputes); Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1520 (2003) (arguing that American courts are biased against foreign litigants in patent disputes); Whytock, *The Evolving Forum, supra* note 11 (empirical analysis finding anti-foreigner bias in forum non conveniens decisions). *But see* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11*, 4 J. EMPIRICAL LEGAL STUD. 441, 464 (2007) (finding that foreigners have higher win-rates than domestic parties in US federal courts, and concluding that "the data offer no support for the existence of xenophobic bias in U.S. courts"); Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719 (2009) (empirical analysis of international choice-of-law decisions by US district courts in tort cases challenging claim that there is anti-foreign party bias in those decisions).

32. *See* Beqiraj & McNamara, *supra* note 2, at 8 (access to justice requires "awareness and understanding" of access-to-justice rights).

33. *See, e.g.*, Vera Shikhelman, *Access to Justice in the United Nations Human Rights Committee*, 39 MICH. J. INT'L L. 453, 460 (2018) ("One of the major obstacles to accessing international justice is the lack of awareness of the possibility of filing cases and the rights protected by human rights treaties.").

34. In federal systems, such as the United States, questions about which governmental sub-unit's (e.g., which US state's) law applies can create such uncertainties even in purely domestic disputes.

Limited Access to Legal Representation. A widely recognized domestic access-to-justice problem is limited access to legal representation.[35] This problem can be magnified in transnational disputes. It may be especially difficult for a foreign party to identify a lawyer who is appropriately licensed and qualified to represent the party in the forum State, due to possible language differences, unfamiliarity with the forum State's legal profession, and lack of connections to lawyer referral networks in the forum State. In some cases, a foreign party might be able to find a lawyer in the foreign party's home State with the knowledge and connections needed to help the party identify a forum State lawyer—but the increased costs of consulting both home State and forum State lawyers may not be affordable to some parties.

Lack of Affordability. Lack of affordability is another access-to-justice problem that exists in many domestic disputes, but can be exacerbated in transnational disputes.[36] Beyond the costs of consulting with home State counsel to identify appropriate forum State counsel, coordination between home State and forum State counsel may be necessary, further increasing costs. In some cases, additional costs—such as translation and travel costs—may make access to justice even less affordable. These increased costs mean that regardless of their legal merits, some smaller claims that might be economically rational in a purely domestic context might be economically irrational in a transnational context.[37] Domestic legal measures that can make legal representation more affordable—such as contingent fee arrangements and procedures for claim aggregation or collective redress—do not exist in all States, and States that provide legal aid to their citizens do not necessarily provide it to foreign parties.[38]

Procedural Barriers. Procedural rules can pose access-to-justice barriers in purely domestic disputes. For example, restrictive rules of standing, pleading, and jurisdiction, and expansive rules of governmental immunity can "close the

35. Cornford, *supra* note 23, at 39 ("Properly understood, access to justice entails a right of equal access to legal assistance for every citizen."); RHODE, *supra* note 17, at 20 ("[T]hose who need legal services, but cannot realistically afford them, should have access to competent assistance.").

36. *See* Cappelletti & Garth, *supra* note 4, at 12 ("[I]t is certainly clear that high costs, to the extent that one or both of the parties must bear them, constitute a major access-to-justice barrier.").

37. *See id*., at 13 ("Claims involving relatively small sums of money suffer most from the barrier of cost. If the dispute is to be resolved by formal court processes, the costs may exceed the amount in controversy or, if not, may still eat away so much of the claim as to make litigation futile."). This follows from the basic economic model of litigation, EV=(p*A)-C, where EV is the expected value of a claim, p is the probability of winning, A is the amount of the award, and C is the costs of litigation. According to that model, a rational litigant will not file a claim unless EV > 0 (that is, if p*A > C). *See* Whytock, *The Evolving Forum*, *supra* note 11, at 487 n.25.

38. However, the Hague Convention on International Access to Justice aims to avoid this. *See* Hague Convention on International Access to Justice art. 1, Oct. 25, 1980, 19 I.L.M. 1505 ("Nationals of any Contracting State and persons habitually resident in any Contracting State shall be entitled to legal aid for court proceedings in civil and commercial matters in each Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.").

courthouse door" in many disputes.[39] In transnational disputes, there are additional procedural doctrines that can limit access to justice.[40] These rules include foreign sovereign immunity and *forum non conveniens*.[41] Procedural rules also limit access to regional and international courts. Typically, the jurisdiction of these courts is strictly limited, and even disputes over which they might have jurisdiction may be subject to admissibility requirements.[42]

Inequalities Between Parties. The "haves" tend to come out ahead when it comes to justice for reasons unrelated to the legal strength of the parties' claims and defenses.[43] This tendency undermines equal access to justice in purely domestic disputes.[44] Because of the complexities and costs described above, this tendency is likely to be even more salient in many transnational disputes, especially those in which one party is a particularly experienced and resource-rich litigant and the other is not.

B. Distinctive Access-to-Justice Problems

In addition to access-to-justice problems that exist in domestic contexts and tend to be exacerbated in transnational disputes, some transnational access-to-justice problems are unlikely to arise in purely domestic disputes. These

39. *See generally* ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE (2017); STASZAK, *supra* note 4; Shauhin Talesh, *The Process is the Problem*, *in* THE LEGAL PROCESS AND THE PROMISE OF JUSTICE: STUDIES INSPIRED BY THE WORK OF MALCOLM FEELEY 72–94 (Rosann Greenspan, Hadar Aviram & Jonathan Simon eds., 2019).

40. *See generally* Pamela Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015). For an overview of these barriers in the United States and the European Union, see MAYA STEINITZ, THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE 83-104 (2018).

41. For empirical analyses of how these doctrines limit court access in US federal courts, see Whytock, *The Evolving Forum*, *supra* note 11 (*forum non conveniens)* and Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access*, 93 B.U. L. REV. 2033 (2013) (foreign sovereign immunity) [hereinafter Whytock, *Foreign State Immunity*].

42. *See* Statute of the International Court of Justice art. 34–36 (governing the Court's jurisdiction). *See also* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 695–705 (9th ed. 2019) (discussing the jurisdiction of the International Court of Justice and exceptions to its jurisdiction); Mario Oetheimer & Guillem Cano Palomares, *European Court of Human Rights*, *in* MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW, para. 16–34 (2013) (discussing jurisdiction and admissibility requirements of European Court of Human Rights) (https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e791?rskey=sK3SuL&result=1&prd=OPIL#).

43. *See* Galanter, *supra* note 24. *See also* RHODE, *supra* note 17, at 5–6 ("The role that money plays in legal, legislative, and judicial selection processes often skews the law in predictable directions.").

44. *See* Cappelletti & Garth, *supra* note 4, at 10 ("Optimal effectiveness…could be expressed as complete 'equality of arms'—the assurance that the ultimate result depends only on the relative legal merits of the opposing positions, unrelated to differences which are extraneous to legal strength and yet, as a practical matter, affect the assertion and vindication of legal rights. This perfect equality, of course, is utopian…the differences between parties can never be completely eradicated. The question is how far to push toward the utopian goal, and at what cost.").

distinctive problems largely arise from the decentralized nature of the global legal system.[45] In addition to international law and international courts, as well as private norms and private forms of dispute resolution, the global legal system also includes each State's domestic legal system.[46] The multistate connections that define a transnational dispute may implicate the legal systems of more than one State, and possibly international rules and institutions as well. This is not the case in most purely domestic disputes.[47] The problem is that there is no central global authority to ensure that at least one domestic legal system provides access to justice in a given transnational dispute, but that multiple systems do not do so for the dispute in ways that conflict with each other. This problem is even more complex if, in addition to domestic legal systems, international law applies or an international court has jurisdiction. The result is two general categories of access-to-justice problems: transnational access-to-justice gaps and transnational access-to-justice conflicts.

1. Transnational Access-to-Justice Gaps

A *transnational access-to-justice gap* arises when no legal system provides access to justice in a transnational dispute. There are three basic types of transnational access-to-justice gaps: jurisdictional gaps, applicable law gaps, and recognition and enforcement gaps.[48]

A *jurisdictional gap* arises when no court is available to adjudicate a transnational dispute in a way that satisfies the requirements of access to justice.[49] This situation may occur if no State has sufficient connections to the parties or the dispute to give it authority to adjudicate under its domestic law or under international law. This may also occur even if a State has authority to adjudicate. For example, a State might not have a legal system that satisfies the institutional requirements (such as impartial and independent courts), procedural requirements (fair procedures), or practical requirements (such as affordability and access to legal representation) for access to justice.

45. *See* Christopher A. Whytock, *The Concept of a Global Legal System*, *in* THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP'S BOLD PROPOSAL (Peer Zumbansen ed., 2020).

46. In addition, the global legal system includes private norms and private forms of transnational dispute resolution. *Id*.

47. However, in a State organized as a federal system, access-to-justice problems analogous to those in transnational disputes may of course arise in disputes that are purely domestic within that State but have connections to more than one governmental subunit.

48. *See* MICHAEL BOGDAN, CONCISE INTRODUCTION TO EU PRIVATE INTERNATIONAL LAW 5 (2d ed. 2012) (explaining that the rules governing applicable law, jurisdiction, and recognition and enforcement of judgments are interconnected and must be coordinated "to avoid the risk of creating a legal vacuum").

49. Maya Steinitz has referred to this as the "problem of the missing forum." *See* STEINITZ, *supra* note 40.

Even if there is a State that both possesses authority to adjudicate and satisfies the institutional, procedural, and practical requirements for access to justice, that State may nevertheless decline to adjudicate the dispute.[50] For example, a court in a State that recognizes the doctrine of *forum non conveniens* may exercise its discretion to dismiss a transnational dispute in favor of a foreign court. It may do so even if it has the authority to adjudicate that dispute.[51] However, it is often uncertain whether the foreign court will actually provide access to justice. First, it is uncertain whether the other State's court will agree to adjudicate the dispute. A court dismissing a transnational dispute on *forum non conveniens* grounds has no authority to require another State's court to adjudicate the dispute, leaving the possibility of a jurisdictional gap.[52] Even if the foreign court agrees to adjudicate the dispute, the increased costs of litigating in the other State may lead a party to abandon its claim, even if the claim is legally strong.[53] Furthermore, even if the foreign court actually adjudicates the dispute, the access-to-justice gap will remain if the foreign State lacks the rule of law and impartial, independent courts. In still other cases, a State's *forum non conveniens* doctrine may allow a court to dismiss a transnational dispute in favor of a foreign court even when the same State's judgment enforcement doctrine would not allow enforcement of a judgment issued by that foreign court.[54] In all of these ways, the *forum non conveniens* doctrine can undermine transnational access to justice by creating jurisdictional gaps.

Similarly, the foreign sovereign immunity doctrine can lead to jurisdictional gaps. This doctrine may require a court in one State to dismiss a claim against a foreign State's government, even if the court would otherwise have the authority to adjudicate the dispute. Beyond that, the doctrine may also prevent other States from adjudicating the dispute, leaving only the foreign State's own courts available.[55] This situation raises the possibility of two additional problems. First,

50. Or, in cases involving multiple defendants, the State may assert jurisdiction as to one (or some) defendants and not other (or all) defendants, requiring the plaintiff to pursue access to justice simultaneously in multiple States. The increased costs of pursuing multiple rather than a single suit may in some cases pose a significant access-to-justice barrier.

51. For a comparative analysis of the forum non conveniens doctrine in Australia, Canada, the United Kingdom and the United States, see RONALD A. BRAND & SCOTT R. JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS (2007).

52. A dispute dismissed from a court on *forum non conveniens* grounds will only continue in a foreign court if the plaintiff refiles the suit in the foreign court and the foreign court asserts jurisdiction. *See* David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L. J. 353, 370 (1994) ("[A] court in New York cannot transfer a case to a court in India. It can only dismiss, impose conditions, and wish the plaintiffs 'Godspeed.'").

53. *See* David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L. Q. REV. 398, 418–20 (1987) (concluding only 14.5% of personal injury plaintiffs and 16.6% of commercial plaintiffs refiled cases abroad after forum non conveniens dismissals).

54. *See generally* Whytock & Burke Robertson, *supra* note 8.

55. Whytock, *Foreign State Immunity*, *supra* note 41.

the foreign State's internal rules of sovereign immunity may prevent adjudication there. Second, the foreign State may lack rule of law or impartial and independent courts. In either situation, the foreign sovereign immunity doctrine can contribute to a jurisdictional gap that prevents access to justice.[56]

The interaction of corporate law and jurisdictional rules can also lead to jurisdictional gaps in transnational disputes. Many multinational corporations have a parent company in a "home" State and engage in business activities in a "host" State through subsidiaries. If those activities injure a person in the host State, that person might, on the one hand, seek a remedy in a host State court. However, access to justice might be unavailable in the host State if it lacks rule of law or impartial and independent courts. Access to justice may also be unavailable if the host State is reluctant to deter foreign investment by imposing liability or if the subsidiary has insufficient assets to satisfy a resulting judgment. On the other hand, the injured person might seek a remedy in a court of the parent company's home State. However, access to justice might not be available there either, because the subsidiary might lack sufficient contacts with the home State for a court there to have jurisdiction, the applicable rules of corporate law may preclude the liability of the parent company for the acts of its subsidiary, or the home State's courts might dismiss the suit on *forum non conveniens* grounds. This "impasse" means that persons harmed in one State by the activities of a multinational business based in another State might lack access to justice in both States.[57]

An *applicable law gap* arises when a court fails to apply substantive law under which a transnational dispute is capable of being resolved justly.[58] This may occur in at least three different ways. First, in theory, there may be situations in which no State's law recognizes a claim or defense for which recognition would, in principle, be required by justice, thus making an applicable law gap inevitable.[59] Second, the forum State may have substantive law that is capable of

56. *Cf.* Richard Garnett, *Foreign State Immunity: A Private International Law Analysis*, *in* RESEARCH HANDBOOK ON JURISDICTION AND IMMUNITIES IN INTERNATIONAL LAW 297, 306–10 (Alexander Orakhelashvili ed., 2015) (positing access-to-justice concerns as one reason to abolish the principles of foreign sovereign immunity); 1 OPPENHEIM'S INTERNATIONAL LAW § 109, 342 (Robert Jennings & Arthur Watts eds., 9th ed. 1996) (foreign sovereign immunity can "den[y] . . . a legal remedy in respect of what may be a valid legal claim; as such, immunity is open to objection").

57. *See* Daniel Augustein, *Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Right to a Remedy*, 18 HUM. RTS. L. REV. 593, 596–97 (2018). *See also* Pigrau & Cardesa-Salzmann, *supra* note 8 (arguing that multinational corporations "have been quite successful in escaping the meshes of justice in this global patchwork of national judiciaries with largely territorial powers").

58. Of course, if one does not include the substantive legal requirements discussed in Part I as part of the concept of access to justice, then one might not consider an applicable law gap to be an access-to-justice problem.

59. Similarly, a court might decide not to decide the merits of a claim "due to the absence of suitable law [or] the vagueness or ambiguity of rules," which is known as a *non liquet*. *See* Ulrich Fastenrath & Franziska Knur, *Non Liquet*, *in* OXFORD BIBLIOGRAPHIES, INTERNATIONAL LAW (2016) (https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0130.xml).

producing a just outcome, but the court may decline to apply that law based on domestic or international legal principles that limit the extraterritorial application of domestic law, and then dismiss the case rather than deciding it under foreign law.[60] If no other State's courts are able and willing to adjudicate the dispute, or if no other State's law is capable of producing a just outcome, this will lead to an applicable law gap.[61] Third, the court may decline to apply forum law and instead apply foreign law based on choice-of-law principles, or vice versa. This choice of law leads to an applicable law gap if the chosen law is incapable of producing a just outcome.[62] In these situations, applicable law gaps may arise that undermine transnational access to justice.[63]

As noted above, whether a given State's law is capable of producing a just outcome will be contestable in most cases because understandings of justice vary across States and across cultures. Yet the possibility of a just outcome is unavoidably part of the concept of access to justice. For this reason, the problem of applicable law gaps merits attention even if they are difficult to identify with certainty. In some cases, however—such as when a law is inconsistent with widely recognized human rights—there may be a high degree of agreement that a particular State's law cannot produce a just outcome.

A *recognition and enforcement gap* arises when an impartial and independent court in one State enters a judgment resolving a transnational dispute in a manner that fulfills the requirements of access to justice, but other States'

60. *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (dismissing securities fraud claim brought by foreign plaintiffs against foreign and US defendants for their misconduct as to securities traded on foreign stock exchanges, because the US statute upon which the claim was based did not apply extraterritorially).

61. Of course, in some such cases there may be an alternative forum willing to adjudicate the dispute and apply law that is capable of producing a just outcome. In the Morrison case, some plaintiffs indeed pursued their claims in Australian courts, and their claims were ultimately settled. *See* Grant Swanson, *A Comparative Law Analysis of Private Securities Litigation in the Wake of Morrison v. National Australia Bank*, 87 CHI.-KENT L. REV. 965, 989 (2012) ("At the time of writing this comment, the Morrison plaintiffs have filed a complaint against NAB in the Supreme Court of Victoria regarding the HomeSide allegations with a commercial litigation funder financing the costs."); Pathway Invs. Pty Ltd. v. Nat'l Austl. Bank Ltd., [2012] V.S.C. 625 (Austl.); *NAB Class Action Update*, MAURICE BLACKBURN (Feb. 2014), https://www.mauriceblackburn.com.au/class-actions/past-class-actions/nab-shareholder-class-action/ (last visited Aug. 4, 2019).

62. *See* Axel Halfmeier, *Is There a World Courthouse on Foley Square? On Civil Procedure, Private International Law and Human Rights in the Age of Globalisation*, *in* 3 GLOBAL GOVERNANCE AND THE QUEST FOR JUSTICE: CIVIL SOCIETY 81, 93 (Peter Odell & Chris Willett eds., 2008) (explaining how in human rights cases, the application of the traditional place-of-the-wrong rule can result in the application of the law of the same State that violated the claimant's human rights, in accordance with how that State would interpret that law, even if that State is a dictatorship, such that "one would return control over the plaintiff's claim to the legal system in which the abuses took place").

63. *See, e.g.*, Al Shimari v. CACI Intern., Inc., 951 F. Supp. 2d 857 (E.D. Va. 2013) (Iraqi citizens filed tort claims against a US private military contractor for abuse and torture while they were detained in Abu Ghraib, Iraq; court determined that Iraqi law, which had been promulgated by the US-led Coalition Provisional Authority, applied, and because that law granted immunity to military contractors, the suit was dismissed), *vacated on other grounds*.

courts decline to recognize or enforce the judgment.[64] For example, a court in one State may resolve a transnational dispute by ordering the non-prevailing party (the "judgment debtor") to pay a sum of money to the prevailing party (the "judgment creditor") as a remedy, but the judgment debtor might refuse to pay. In purely domestic disputes, the judgment debtor will typically have assets in the forum State, and the court can order the attachment and sale of those assets to satisfy the judgment. In transnational disputes, however, it is not unusual for the judgment debtor to lack assets in the forum State. In this situation, the judgment creditor will seek a State where the judgment debtor has assets and ask a court there to enforce the judgment against those assets. If the court refuses to enforce the judgment, the judgment creditor will be left without a remedy, thus preventing complete access to justice.[65]

Three final points on transnational access-to-justice gaps deserve attention. First, the discussion above has pointed to various legal doctrines—including conflict-of-laws doctrines, the *forum non conveniens* doctrine, and the foreign sovereign immunity doctrine—as potential contributors to transnational access-to-justice gaps. But this does not mean that those doctrines are categorically inappropriate. To the contrary, they generally are based on legitimate policies. The point is rather that in spite of any virtues these doctrines may have, they can

64. The link between access to justice and the recognition and enforcement of foreign judgments is well-established under European human rights law and European Union Law. *See* FAWCETT, SHÚILLEABHÁIN & SHAW, *supra* note 5, at 78–79 (discussing the role of recognition and enforcement of foreign judgments under Article 6 of the European Convention on Human rights); Consolidated Version of the Treaty on the Functioning of the European Union, art. 67(4), Dec. 17, 2007, 2010 O.J. (C 306) 1 ("The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters."). Access to justice is also a leading rationale for the Draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, under consideration by the Hague Conference on Private International Law. *See* Francisco Garcimartin & Genevieve Saumier, *Judgments Convention: Revised Draft Explanatory Report* 5 (Dec. 2018), https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf (last visited Aug. 4, 2019) ("This draft Convention seeks to promote access to justice globally through enhanced judicial cooperation…. First, and most importantly, the draft Convention will ensure that judgments to which it applies will be recognised and enforced in all Contracting States, thereby enhancing the practical effectiveness of those judgments and ensuring that a successful party can obtain meaningful relief. Access to justice is frustrated if a wronged party obtains a judgment which cannot be enforced in practice because the other party and/or the other party's assets are in another State where thee judgment is not readily enforceable."). *See also* ANTÔNIO AUGUSTO CANÇADO TRINDADE, THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE 71 (2011) ("[T]he right of access to justice comprises…the right to protection by means of faithful compliance with judicial decisions."); Goddard, *supra* note 25 ("Access to justice means access to practical justice; to just outcomes that are given effect. In today's increasingly globalized world, it is frequently necessary for that practical effect to span borders, if justice is to be effective. So the goal of access to justice [entails] access to just outcomes that are practically effective in every State where they need to be implemented…."); Christopher A. Whytock, *Enforcement of Foreign Judgments: Governance, Rights, and the Market for Dispute Resolution Services*, *in* THE TRANSFORMATION OF ENFORCEMENT: EUROPEAN ECONOMIC LAW IN GLOBAL PERSPECTIVE 47, 52 (Hans W. Micklitz & Andrea Wechsler eds., 2016) (explaining the link between foreign judgment enforcement and access to justice).

65. *See* Whytock & Burke Robertson, *supra* note 8, at 1463–64.

impose transnational access-to-justice costs, and those costs must be considered in any analysis of those doctrines.

Second, while this discussion has focused primarily on domestic courts and domestic law, the global legal system also includes international courts and international law. As discussed below, a regional or international court may occasionally be able to fill jurisdictional gaps by adjudicating transnational disputes—but the jurisdiction of these courts is generally very limited.[66] Moreover, in some cases international law may be able to fill applicable law gaps by supplying rules of decision that can produce just outcomes when domestic courts adjudicate transnational disputes—but there are domestic law limits on the authority of domestic courts to apply international law, and those limits are quite strict in some States.[67] Thus, international courts and international law presently do not provide complete solutions to the transnational access-to-justice gaps discussed above.

Third, all three types of transnational access-to-justice gaps—jurisdictional gaps, applicable law gaps, and recognition and enforcement gaps—are due to the highly decentralized nature of the global legal system.[68] In theory, these gaps could be avoided if there were a centralized authority that could effectively coordinate the world's domestic legal systems to ensure an available court, applicable law, and recognition and enforcement for every transnational dispute. However, it is difficult to imagine such a solution in the foreseeable future.

2. Transnational Access-to-Justice Conflicts

A *transnational access-to-justice conflict* may arise when two or more States attempt to provide access to justice for the same transnational dispute. A paradox underlies transnational access-to-justice conflicts: *Individually* each State may satisfy the requirements of access to justice, but *collectively* they may create

66. *See generally* KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2014).

67. *See generally* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 45-100 (9th ed. 2019).

68. Currently, there is no rule of public international law requiring a State to exercise jurisdiction that it possesses, even when exercising jurisdiction would be necessary to avoid a transnational access-to-justice gap. *See* Alex Mills, *Connecting Public and Private International Law*, *in* LINKAGES AND BOUNDARIES IN PRIVATE AND PUBLIC INTERNATIONAL LAW 13, 23 (Verónica Ruiz Abou-Nigm, Kasey McCall-Smith & Duncan French eds., 2018) ("[W]hile public international law establishes that a state may not impose its regulation in the absence of a recognised justification, it does not (at least generally) *require* that a state regulation be exercised where such a recognised justification exists. Principles of access to justice, developing particularly in the context of human rights law, *may* in the future have an increased role in requiring states to exercise and perhaps even expand their grounds of civil jurisdiction, but at present they have had a limited influence, except in relation to the protection of weaker parties (like consumers or employees) and less frequently in the adoption of forum of necessity rules of jurisdiction.").

access-to-justice problems.[69] There are three basic types of transnational access-to-justice conflicts: jurisdictional conflicts, applicable law conflicts, and judgments conflicts.

Jurisdictional conflicts may arise when courts in two or more States assert jurisdiction to adjudicate the same dispute—that is, when there is parallel litigation.[70] Each court may have a reasonable basis for asserting jurisdiction, and each State's legal system may have procedural rules that satisfy access-to-justice requirements. However, when multiple courts assert jurisdiction over the same dispute, the parties are forced to litigate their dispute in multiple States, which may greatly increase costs.[71] This is inefficient, and in some cases a party may find it cost prohibitive for a party to pursue or defend litigation in more than one State, even if their claims or defenses are legally strong. In addition, parallel litigation raises the specter of further access-to-justice problems, including applicable law conflicts and judgment conflicts, as discussed below.[72]

Applicable law conflicts may arise when the legal rules of two or more States provide different rights or impose different obligations for parties in the same transnational dispute. For example, one State's law may recognize a given claim or defense, while another State's law might not. Subjecting a party to inconsistent legal rules in the same dispute is inconsistent with access to justice. In purely domestic disputes, applicable law conflicts are unlikely because a State's domestic legal rules generally are (or generally should be) internally consistent,[73] and

69. *Cf.* Duncan French & Verónica Ruiz Abou-Nigm, *Jurisdiction: Betwixt Unilateralism and Global Coordination*, *in* LINKAGES AND BOUNDARIES IN PRIVATE AND PUBLIC INTERNATIONAL LAW 75, 86 (Verónica Ruiz Abou-Nigm, Kasey McCall-Smith & Duncan French eds., 2018) ("As private international law rules provide for a range of suitable connections, more often than not it is plainly possible for the courts of two or more countries to have jurisdiction, i.e., to be competent to adjudicate a particular cross-border dispute (known as concurrent jurisdiction). While this could be seen as desirable in principle, facilitating the right of access to justice, and fostering global connectivity, yet, the downside is the possibility of the abuse of forum shopping tactics, usually by the party that is better placed to take advantage of such opportunities. In any case the simultaneous exercise of jurisdiction by more than one court in parallel proceedings, that is, in cases between the same parties and based on the same cause of action, is clearly inefficient.").

70. In some cases, however, a court in one State may allow ancillary proceedings to provide judicial assistance to a court in another State, without any adjudication of the merits of the case. In that situation, the multiple proceedings may actually facilitate transnational access to justice rather than undermining it.

71. *See* Goddard, *supra* note 25 ("[A]t present it is often necessary for a party to a dispute to bring substantive proceedings of the same kind in more than one country in order to obtain the desired practical outcome. Avoiding the need for duplicative proceedings will contribute significantly to access to justice, and to reducing the costs and risks of cross-border dealings.").

72. Private international law rules on parallel litigation—e.g. *lis pendens* stays, antisuit injunctions, and first-to-file rules—implicitly attempt to mitigate these problems. They do not question the ability of any State individually to offer genuine access to justice, but they at least implicitly acknowledge the access-to-justice problems raised by joint assertion of jurisdiction.

73. Of course, in States organized as federal systems, different governmental subunits (US states, Swiss cantons, etc.) may have different laws, raising federal issues similar to those in transnational disputes.

ordinarily there would be no reason to consider applying any other State's law.[74] However, when the dispute has multi-State connections, two or more States' laws might reasonably be applied to the same dispute.

An applicable law conflict is most serious if one State's law requires a party to do something forbidden by another State's law.[75] For example, discovery rules in the United States may require a party to respond to another party's discovery requests. On the other hand, a "blocking statute" in another State may forbid the other party from responding to those requests.[76] Neither State's rule is intrinsically unjust, but when both States' rules are simultaneously applied the result is unjust: A single party will be required to comply with two rules but incapable of complying with both. Thus, the party will inevitably be in violation of the law of one State or the other. To be clear, the reason that applicable law conflicts can pose transnational access-to-justice problems is not that the applicable law of any given State is somehow unjust (although that, too, would be a problem), or that one State's law is in some sense "better" than the other's.[77] Instead, the reason is simply that a party may be simultaneously subjected to the laws of more than one State and those laws may be inconsistent with each other.

Judgment conflicts arise when the courts of two or more States enter conflicting judgments. For example, in the same transnational dispute between the same parties, one court might issue a judgment in favor of one party on an issue, and another court might enter a judgement in favor of the other party on the same issue.[78] Even if each judgment is the result of fair and impartial procedures and not in any sense unjust, the judgments together may undermine access to

74. An exception (albeit an uncommon one) would be a purely domestic contract dispute where the contract contains an enforceable choice-of-law clause that indicates the law of a foreign State.

75. *Cf.* Anthony J. Colangelo, *Absolute Conflicts of Law*, 91 IND. L. J. 719, 729 (2016) ("With absolute conflicts of law…it is impossible to comply with both laws simultaneously. This impossibility…imports powerful rule of law considerations that disfavor subjecting parties to contradictory legal commands in arbitrary fashion.").

76. GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 966–67 (6th ed. 2018).

77. This notion that different laws can both be (but are not necessarily always) just is implicit in private international law (foreign law is routinely applied under choice-of-law rules, but those rules are typically subject to a public policy exception) and human rights law (which typically confers to States a margin of appreciation). *See generally* HAY, BORCHERS, SYMEONIDES & WHYTOCK *supra* note 14, § 3.15, at 149–51 (discussing public policy exception); ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY (2012).

78. Private international law rules on judgments generally attempt to mitigate these problems by refusing recognition and enforcement of a judgment in conflict with an earlier, inconsistent judgment and by having a public policy exception. *See, e.g.*, Hague Conference on Private International Law, *Convention of 30 June 2005 on Choice of Court Agreements* art. 9, https://www.hcch.net/en/instruments/conventions/full-text/?cid=98 (last visited Aug. 4, 2019) (including both grounds for refusing recognition and enforcement).

justice.[79] From a plaintiff's perspective, even if one State's court entered a judgment providing a remedy, that remedy may be difficult or impossible to obtain if a second State's court denies that remedy (especially if the defendant and the defendant's assets are in that second State). From a defendant's perspective, one State's judgment might impose requirements that are inconsistent or even incompatible with those imposed by a second State's judgment, and in some cases simultaneous compliance with both might not be possible.

Access-to-justice conflicts arise because there is no central global authority that allocates jurisdiction over each transnational dispute to a single State or international court or dictates the application of a single body of law. In this sense, access-to-justice conflicts, like access-to-justice gaps, are due to the decentralized structure of the global legal system.

C. Access-to-Justice Problems Involving International Institutions

In addition to access-to-justice barriers that can be exacerbated in transnational disputes and those that are distinctive to transnational disputes, a third factor distinguishes transnational access to justice: the role of international institutions.

On the one hand, special access-to-justice problems may arise when individuals have claims against international organizations. There are hundreds of international organizations in the world that make many positive contributions to global governance.[80] But they can, and historically they sometimes have, done wrong.[81] When that happens, access to justice is often lacking. As Pierre Schmitt argues in an in-depth study of this problem:

> In cases where the rights of individuals may be threatened or violated by international organizations, the aggrieved individual may seek to obtain a remedy from the international organization. However, this entails two necessary conditions: first, this presupposes the existence of a legal regime governing the responsibility of international organizations towards individuals; second, there has to be an accountability mechanism where individuals can claim such responsibility

79. Judgments based on proceedings that do not meet the procedural requirements for access to justice, such as impartiality and independence, also raise access-to-justice problems. Ideally, such problems are resolved in the State where the judgment was entered through appellate or other review procedures, but this cannot be assured in States lacking rule of law. *See* UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT, § 4 cmt. 7 (UNIF. LAW COMM'N 2005) (explaining that "the assertion that intrinsic fraud has occurred should be raised and dealt with in the rendering court").

80. By one count, there were 285 conventional international organizations in 2017, and there are an additional 1,655 unconventional international organizations. *See* Yearbook on International Organizations, *Figure 2.1: Number of International Organizations by Type*, UNION OF INT'L ASS'NS (2018).

81. *See* SHELTON, *supra* note 5, at 45 ("International organizations figure among the non-State entities whose proliferation and increased power have raised the question of their responsibility for human rights violations. International organizations are taking on many new and extended functions throughout the world, from expansion of traditional peacekeeping to governance and managing common resources. These new roles place them in a position where they have the capacity to violate the human rights of individuals not only within, but outside the organization.").

> and consequently ask for redress. Nowadays, it is clear that both foundations are to a large extent shaky or even inexistent.[82]

This access-to-justice gap is due to three factors. First, there is no established international legal framework for determining the responsibility of international organizations toward individuals.[83] The Draft Articles on the Responsibility of International Organizations adopted by the United Nations International Law Commission in 2011 contemplates the invocation of an international organization's responsibility only by States and other international organizations.[84] Second, international courts typically lack jurisdiction over claims brought by individuals against international organizations, and not all international organizations have internal procedures for handling such claims.[85] Third, access to justice in national courts is often precluded by jurisdictional immunities granted to international organizations under domestic or international law.[86] As Schmitt puts it, this means that "individuals aggrieved by acts of international organizations are frequently left out in the cold."[87]

On the other hand, international institutions—particularly, international courts—can increase access to justice. There are a growing number of international courts that, in theory, can help fill transnational access-to-justice gaps left open by domestic courts. However, for four reasons, the promise of international courts as contributors to access to justice is subject to important limits in today's global legal system. First, some international courts are accessible only to States. Second, even international courts that allow access to individuals and other non-State actors often subject that access to various conditions, such as

82. SCHMITT, *supra* note 15, at 1–2.

83. *Id*. at 2.

84. *See* Int'l Law Comm'n, *Draft Articles on the Responsibility of International Organisations*, art. 43 and art. 49, U.N. Doc. A/66/10; GAOR, 63th Sess., Supp. No. 10 (2011). Moreover, the Draft Articles clearly contemplate obligations that "may be owed to one or more States, to one or more other organizations, or to the international community as a whole," but they do not explicitly address obligations that may be owed to individuals. *See id*. at art. 33 ("1. The obligations of the responsible international organization set out in this Part may be owed to one or more States, to one or more other organizations, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach. 2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization."). *See generally* RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: ESSAYS IN MEMORY OF SIR IAN BROWNLIE (Maurizio Ragazzi ed. 2013).

85. *Id*. at 2. *See also* August Reinisch, *Securing the Accountability of International Organizations*, 7 GLOB. GOVERNANCE 131, 139 (2001) ("As a rule, international courts have no jurisdiction to adjudicate claims against international organizations").

86. RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS, *supra* note 84, at 2 (in most cases "the only option that remains available to individuals is at the national level and in domestic courts, where international organizations generally enjoy immunity from jurisdiction and immunity from enforcement"). On these domestic and international rules of immunity, see generally THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS (August Reinisch ed. 2013).

87. SCHMITT, *supra* note 15, at 2.

a determination of admissibility, the consent of the respondent State (in claims against States), or referral by a commission or other non-judicial body. Third, the jurisdiction of international courts is limited by factors that may include subject matter, membership, or geographic scope. Fourth, the global legal system lacks reliable processes for the enforcement of international court judgments.[88] Thus, notwithstanding their important contributions, international courts are currently unable to provide meaningful access to justice in most transnational disputes, especially those between private parties.[89]

Finally, while the availability of international courts may increase access to justice, it may also contribute to access-to-justice conflicts. As discussed above, jurisdictional conflicts can arise if the domestic courts of two or more States assert jurisdiction over the same transnational dispute. In some cases, an international court—or even more than one international court—may also assert jurisdiction, which could lead to a type of jurisdictional conflict that is unlikely to arise in purely domestic disputes.[90]

To summarize: The role of international institutions distinguishes transnational access to justice from domestic access to justice. Special access-to-justice problems arise when individuals have claims against international organizations. International courts can in some cases help remedy access-to-justice gaps, but they also create potential jurisdictional conflicts.

III. ACCESS TO JUSTICE AS A GLOBAL GOVERNANCE PROBLEM

This Article has argued that there are important reasons for access-to-justice research to examine the distinctive access-to-justice problems faced by parties in transnational disputes and in domestic disputes. It has further argued these problems should be understood in the context of the decentralized global legal system (as well as in the context of domestic legal systems). An additional reason to focus on access to justice from a transnational perspective is that access to justice is not only a domestic governance problem, but also a global governance

88. *See generally* KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2014). For a discussion of the trend toward providing direct access to individuals in international human rights tribunals such as the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights, see CANÇADO TRINDADE, *supra* note 64, at ch. II.

89. *See* SCHMITT, *supra* note 15, at 103 ("It is true—although regrettable—that there are currently no global international mechanisms which grant an individual the possibility of exercising an effective right of access to justice in the absence of treaty law."). For a proposal for an international court that would address this problem, see STEINITZ, *supra* note 40.

90. *See generally* YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS (2003); YUVAL SHANY, REGULATING JURISDICTIONAL INTERACTIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS (2007). This possibility has also led to debates over whether the increase in international courts is contributing to the fragmentation of international law. *See* Pierre-Marie Dupuy & Jorge E. Viñuales, *The Challenge of "Proliferation": An Anatomy of the Debate*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 143–49 (Cesare P. R. Romano, Karen J. Alter & Yuval Shany eds., 2013).

problem.[91] First, international law—one of the principal instruments of global governance—increasingly recognizes access to justice as a right. Second, access to justice is on the agendas of various international organizations. Finally, global governance itself depends significantly on access to justice. For these three reasons, access to justice is more than a matter of domestic governance—it is a global governance problem, too.

A. International Law and Access to Justice

International law increasingly recognizes access to justice as a right. This right is more firmly established in some areas of international law than others. As such, it may be premature to state that a general international legal right to access to justice exists, even if such a right would be desirable. Nevertheless, as Francesco Francioni concludes, "access to justice has come a long way towards its recognition as a true enforceable right under international law."[92]

One well established aspect of access to justice is the customary international law duty of a State to provide basic justice to foreigners injured within its territory.[93] A "denial of justice" occurs when a State violates that duty.[94] As one exhaustive study concludes, even if the precise scope of the concept of denial of justice is not entirely settled, it clearly includes a State's refusal to allow foreigners to establish their rights before the State's ordinary courts.[95] More specifically, "[d]enial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial

91. *See generally* Ziller, *supra* note 8; Javier L. Ochoa Munoz, *Transnational Access to Justice and Global Governance (Introductory Comments to the ASADIP Principles on Transnational Access to Justice)*, 20 REVISTA DE DIREITO BRASILEIRA 336 (2018) (introducing principles "designed to help guarantee fundamental rights, especially the right of access to justice, from a perspective of global governance") (abstract available at https://go.gale.com/ps/anonymous?id=GALE%7CA598536992&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=2237583X&p=AONE&sw=w). The ASADIP Principles are discussed below. The link to domestic governance is well established. *See* Michael M. Karayanni, *The Extraterritorial Application of Access to Justice Rights: On the Availability of Israeli Courts to Palestinian Plaintiffs*, *in* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 210, 218 (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2014) (arguing that "[t]he most fundamental value…is achieving access to justice as a basic tool in a participatory democracy" and that "[t]o have access to justice means to belong to the realm of societal decision; to be excluded from one is to be denied the other"). *See also* UNITED NATIONS DEV. PROGRAMME, *supra* note 7 (last visited Aug. 4, 2019) ("There are strong links between establishing democratic governance, reducing poverty and securing access to justice.").

92. Francioni, *supra* note 16, at 54.

93. *See* Francioni, *supra* note 16, at 10 (arguing that access to justice is "an integral part of the guarantees provided by the international standard on the treatment of aliens"); JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 1 (2005) (arguing that the duty of States "to provide decent justice to foreigners" is "one of [international law's] oldest principles").

94. *See* PAULSSON, *supra* note 93, at 62 (defining the customary international law concept of "denial of justice" as a State's "administ[ration] [of] justice to aliens in a fundamentally unfair manner").

95. *Id*. at 65 (referencing a study by Vattel, who proposed that not allowing foreigners to establish rights before the ordinary courts comprised a denial of justice).

process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment."[96]

However, this right to access to justice is limited to foreign nationals, and it is a right only against the State in which the foreign national suffered the alleged injury.[97]

An international legal right to access to justice for human rights violations is also widely recognized. A variety of human rights treaties explicitly provide such a right. For example, Article 13 of the European Convention on Human Rights provides: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."[98] Article 47 of the Charter of Fundamental Rights of the European Union provides:

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.[99]

Article 7(1) of the African Charter on Human and Peoples' Rights provides: "Every individual shall have the right to have his cause heard. This comprises…[*inter alia*] [t]he right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force…."[100]

Beyond these treaty provisions, some experts argue that customary international law recognizes a right to access to justice for violations of human rights law.[101] Such a right has also been declared by the United Nations General

96. Harvard Research in International Law, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT'L L. (Supplement) 131, 134 (1929). *See also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 529 (7th ed. 2008) (referring to the Harvard study as probably "the best guide" to the concept's meaning).

97. *See* Francioni, *supra* note 16, at 9 (explaining these and other limits).

98. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S.

99. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 18.

100. African Charter on Human and People's Rights, June 27, 1981, 1520 U.N.T.S. 217.

101. *See* SHELTON, *supra* note 5, at 432 ("The right of access to judicial remedies is widely guaranteed in international human rights treaties and can be considered as part of the corpus of the customary international law of human rights."); Riccardo Pisillo Mazzeschi, *Access to Justice in Constitutional and International Law: The Recent Judgment of the Italian Constitutional Court*, 24 IT. Y.B. INT'L L. 9, 13 (2014) ("The right of access to justice for violations of human rights (or at least of *fundamental* human rights) is, in my opinion, now established by a customary international norm."). *See also* Jurisdictional Immunities of the State (Germany v. Italy), Dissenting Opinion of Judge

Assembly: "A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law."[102]

A more general international legal right to access to justice—one that extends beyond human rights violations to other types of disputes—is also recognized, but to a more limited extent. For example, Article 8 of the Universal Declaration of Human Rights broadly provides that: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[103] Article 8 of the American Convention on Human Rights states that: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."[104]Article 5 of the Association of Southeast Asian Nations' Human Rights Declaration provides: "Every person has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law."[105] Article 12 of the Arab Charter on Human Rights provides: "The States parties…shall…guarantee every person subject to their jurisdiction the right to seek a legal remedy before courts of all levels."[106]

In addition, the European Court of Human Rights has interpreted Article 6 of the European Convention on Human Rights to recognize a broad right to access to justice. Article 6 provides that "[i]n the determination of his civil rights and

Cançado Trindade, 2012 I.C.J. (Feb. 3); Francioni, *supra* note 16, at 41 (human rights treaties and judicial practice show that "access to justice is generally recognized as a human right in the context of domestic law and that every state is under an obligation to fulfill such right by making available a system of effective remedies to all persons subject to its jurisdiction and under its control"); Manfred Nowak, *The Right of Victims of Gross Human Rights Violations to Reparation*, *in* RENDERING JUSTICE TO THE VULNERABLE—LIBER AMICORUM IN HONOUR OF THEO VAN BOVEN 203 (Fons Coomans ed. 2000) (arguing that "the right of victims of (gross) human rights violations to adequate reparation … is already fairly well established under present international law").

102. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, U.N. G.A. Res. 60/147, U.N. Doc A/60/147 (Dec. 16, 2005).

103. Universal Declaration of Human Rights, Art. 8, GA Res. 217A (III), UN GAOR, 3d Sess., Resolutions, at 71, UN Doc. A/810 (1948).

104. American Convention on Human Rights, 1144 U.N.T.S. 123, 9 I.L.M. 673.

105. Ass'n of Se. Asian Nations [ASEAN], ASEAN Human Rights Declaration (Nov. 19, 2012), https://asean.org/asean-human-rights-declaration/.

106. Arab Charter on Human Rights, League of Arab States, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893. *See also id.* at art. 13 ("1. Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations. Each State party shall guarantee to those without the requisite financial resources legal aid to enable them to defend their rights. 2. Trials shall be public, except in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights.").

obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[107] As the European Court of Human Rights has held:

> [Article 6] secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court," of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6…as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing.[108]

Notwithstanding these treaty provisions, a general right to access to justice does not appear to be as widely recognized as the right implicit in the denial of justice concept or the right in the context of human rights violations.

The right to access to justice is also expressed in a variety of private international law (or "conflict of laws") doctrines.[109] For example, under the doctrine of jurisdiction by necessity (*forum necessitatis*), "a court has exceptional jurisdiction if justice so demands, even absent the usual requirements, because no other forum is available to the plaintiff."[110] The doctrine is sometimes justified as permitted, or even required, by either a legal right to access to justice or the international law prohibition of denial of justice.[111] In addition, the right to access to justice is implicit in the adequate alternative forum requirement of the *forum non conveniens* doctrine.[112] Although the doctrine may permit denial of court access in a particular forum, the alternative forum requirement embodies the

107. European Convention on Human Rights, *supra* note [98], at art. 6.

108. Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A) at 36 (1975). For a detailed analysis of the rights protected by Article 6, see FAWCETT, SHÚILLEABHÁIN & SHAH, *supra* note 5, at 60–79.

109. *See generally* J. J. Fawcett, *General Report*, *in* DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW 1 (J. J. Fawcett ed., 1995).

110. Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1053–54 (2006). *See also* Alex Mills, *Rethinking Jurisdiction in International Law*, 84 BRIT. Y.B. OF INT'L L. 187, 223–24 (2014) ("'[F]orum of necessity' rules…support[] an assertion of jurisdictional power (and event duty) to protect the rights of private parties in the absence of the connections of territory or nationality which would traditionally be required under private or public international law rules of jurisdiction.").

111. *See* French & Ruiz Abou-Nigm, *supra* note [69], at 98 ("[T]he rationale underpinning [forum of necessity jurisdiction] is considered to be based on, or even imposed by, the right to a fair trial under Article 6(1) of the European Convention on Human Rights."); Arnaud Nuyts, *Study on Residual Jurisdiction: General Report* (2007), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.193.8681&rep=rep1&type=pdf (last visited Aug. 4, 2019) (commenting that the jurisdiction by necessity principle is, in some States, based on the right to a fair trial and the prohibition of denial of justice).

112. Typically, dismissal is not permitted on *forum non conveniens* grounds unless there is an adequate alternative forum in which the plaintiff may pursue the claim. *See* Fawcett, *supra* note [109], at 14–15 ("It is an essential requirement for declining jurisdiction on the basis of forum non conveniens in Britain, other Commonwealth States, and the United States that there is an alternative forum abroad.").

principle that a *forum non conveniens* dismissal should not deny the plaintiff access to justice altogether.[113]

As this discussion shows, international law—one of the principal instruments of global governance—widely recognizes access to justice as a right. The scope of this right, and its status as customary international law, are not entirely settled. Nevertheless, its recognition shows that access to justice is a global governance issue, not merely a domestic governance issue. Of course, as Part II's discussion of transnational access-to-justice gaps and transnational access-to-justice conflicts showed, the right to access to justice is far from fully realized in practice.

B. International Organizations and Access to Justice

Another indication that access to justice is a global governance problem is that promotion of access to justice is on the agendas of governmental and nongovernmental international organizations.[114] One of the targets of the United Nations' Sustainable Development Goals is to "ensure equal access to justice for all."[115] The United Nations Development Programme[116] and the Organisation for Economic Co-operation and Development[117] are among the international organizations promoting access to justice. International nongovernmental organizations promoting access to justice include the World Justice Project,[118] the Bingham Centre for the Rule of Law, and the International Bar Association.[119]

As is the case with access-to-justice scholarship, most of the access-to-justice work of international organizations focuses on domestic access to justice. However, there are notable exceptions. For example, in 1980, the Hague Conference on Private International Law adopted the Convention on International Access to Justice, which declares that the signatories "[d]esir[e] to facilitate

113. *See* Whytock & Burke Robertson, *supra* note 8, at 1454–62 (arguing that the alternative forum requirement is "[t]o ensure that the plaintiff will have court access somewhere and that the dismissal will not entirely deny the plaintiff access to justice" but observing adequacy standard applied to a putative alternative forum is very lenient in practice and therefore might not effectively ensure such access); Mills, *supra* note 111, at 226–27 ("English courts…have increasingly considered the availability of an alternative forum before which the claimant can practically achieve justice to be one of the central questions in exercising the *forum non conveniens* discretion. In the absence of such an alternative forum English proceedings are highly likely to continue, to ensure that the claimant has 'access to justice.'").

114. For an overview of other access-to-justice initiatives by international organizations, see MacDonald, *supra* note 3, at 497–98.

115. UNITED NATIONS, *Sustainable Development Goals*, Goal 16, Target 16.3, https://www.un.org/sustainabledevelopment/peace-justice/ (last visited Aug. 4, 2019).

116. *See* UNITED NATIONS DEV. PROGRAMME, *supra* note 7.

117. ORGANISATION FOR ECO. CO-OPERATION AND DEV., *Access to Justice*, https://www.oecd.org/gov/access-to-justice.htm (last visited Aug. 4, 2019).

118. *Global Insights on Access to Justice*, WORLD JUST. PROJECT, https://worldjusticeproject.org/our-work/wjp-rule-law-index/special-reports/global-insights-access-justice (last visited Aug. 4, 2019).

119. *See, e.g.*, Beqiraj & McNamara, *supra* note 2.

international access to justice" and provides that "[n]ationals of any Contracting State and persons habitually resident in any Contracting State shall be entitled to legal aid for court proceedings in civil and commercial matters in each Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State."[120] The Principles on Transnational Access to Justice approved in 2016 by the American Association of Private International Law (ASADIP) is another important project focused specifically on access-to-justice issues that arise in transnational disputes.[121]

C. Global Governance and Access to Justice

As discussed in the last two Sections, certain principles of international law and certain international organizations aim to improve access to justice. However, the relationship between global governance and access to justice is not one-way—access to justice can also improve the quality of global governance.

First, transnational access to justice can enhance the *legitimacy* of global governance. One threat to this legitimacy is the perception—and to some extent the reality—that global governance is dominated by a relatively small number of powerful States and multinational business interests. Individuals, civil society groups and other less powerful actors often perceive little opportunity for them to participate in and voice grievances about global governance. Broader transnational access to justice for such grievances—whether provided by national or international courts—could enhance the legitimacy of global governance by giving these stakeholders more involvement and voice. In this sense, access to justice is, in the words of Jacques Ziller, "[un] instrument d'inclusion dans la gouvernance mondiale"—an instrument of inclusion in global governance.[122]

Second, transnational access to justice can enhance the *effectiveness* of global governance. Courts play an important role in domestic governance.[123]

120. Hague Convention on International Access to Justice, *supra* note 38.

121. AM. ASS'N OF PRIV. INT'L L., *supra* note 5. Although not explicitly organized around the goal of transnational access to justice, two other projects on transnational civil procedure address many topics that are relevant to transnational access to justice: the ALI/UNIDROIT Principles of Transnational Civil Procedure adopted in 2004, and the current ELI–UNIDROIT Transnational Principles of Civil Procedure project. *See*, *Study LXXVIA - Transnational Civil Procedure - Formulation of Regional Rules*, UNIDROIT https://www.unidroit.org/work-in-progress/transnational-civil-procedure (last visited Aug. 4, 2019).

122. Ziller, *supra* note 8, at 41. *See also* Rachel A. Cichowski, *Introduction: Courts, Democracy, and Governance*, 39 COMP. POL. STUD. 3, 7 (2006) (Emphasis added) ("[E]xtending public access to courts can increase citizen and interest group participation in the development, monitoring, and enforcement of laws . . .").

123. *See generally* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981); MARTIN SHAPIRO & ALEC STONE, SWEET, ON LAW, POLITICS, AND JUDICIALIZATION (2002).

They also play an important role in global governance.[124] Domestic courts also contribute to global governance, by helping allocate governance authority among States, international institutions, and private actors, and by determining the rights and obligations of persons in transnational disputes.[125] This is called "transnational judicial governance."[126] However, neither international courts nor domestic courts act on their own. Instead, they must be activated by disputants with legal claims. As Martin Shapiro and Alec Stone Sweet put it, "litigants activate courts, and thus it is obvious that patterns of litigation partly fix the parameters for how judges impact politics."[127] Transnational access to justice allows private parties to perform that role, thereby enabling transnational judicial governance.[128]

Third, and closely related to effectiveness, transnational access to justice can improve *oversight* in global governance. Any effective system of governance requires some degree of oversight to determine whether rules are being followed and when steps need to be taken to elicit compliance. In their study of congressional oversight of administrative agencies, US political scientists Mathew McCubbins and Thomas Schwartz distinguish two basic forms of oversight: "police patrols" and "fire alarms."[129] The police patrol approach is "comparatively centralized, active, and direct: at its own initiative, Congress examines a sample of executive agency activities, with the aim of detecting and remedying any violations of legislative goals and, by its surveillance, discouraging such violations."[130] The "fire alarm" approach is "less centralized and involves less active and direct intervention than police-patrol oversight." Instead, it relies on "a system of rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine administrative

124. *See generally* COURTS CROSSING BORDERS: BLURRING LINES OF SOVEREIGNTY (Mary L. Volcansek & John F. Stack, Jr. eds., 2005) (reviewing the role of international courts in world politics).

125. Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 69, 75–96 (2009).

126. *See* Christopher A. Whytock, *Transnational Judicial Governance*, 2 ST. JOHN'S J. INT'L & COMP. L. 55 (2012).

127. SHAPIRO & STONE SWEET, *supra* note 127, at 293. *See also* Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, part III.B (2016) (arguing that global forum shopping contributes to regulatory enforcement through private litigation); Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219 (2001) (discussing the role of private litigants in judicial regulation of transnational economic activity).

128. Karayanni, *supra* note 91, at 217 ("Because courts do not solicit litigants to file claims so that they can eventually render judgments on a certain topic but are dependent on claimants' initiatives, it is imperative and instrumental for the judiciary to guarantee litigants a meaningful right of access to courts in order to fulfil its functions as a branch of government. It is through the handling of disputes that courts shape and influence policy, whether by the mere fact of setting a precedent, by rendering relief that affects the rights and status of numerous others, or by clarifying the meaning of law.").

129. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

130. *Id*.

decisions…, to charge executive agencies with violating congressional goals, and to seek remedies from agencies, courts, and Congress itself."[131] McCubbins and Schwartz argue that the fire alarm approach will often be optimal.[132]

The distinction between police patrols and fire alarms also applies to global governance.[133] A police patrol approach to oversight in global governance would require centralized global institutions actively monitoring compliance—but due to lack of resources and lack of political will, the feasibility of such an approach would be remote on a global scale. An alternative is a fire alarm approach that encourages private parties to draw attention to violations by seeking remedies in court. By enabling private parties to perform this role, transnational access to justice can enhance the oversight function in, and ultimately the effectiveness of, global governance.

CONCLUSION

This Article has argued for three shifts in thinking about access to justice. First, to understand the full range of access-to-justice problems that exist in the world, access-to-justice studies should explicitly incorporate the perspective of parties in transnational disputes, not just the perspective of parties in purely domestic disputes. Second, due to the multi-State connections that define transnational disputes, transnational access to justice should be understood in the context of the decentralized global legal system, not only in the context of individual domestic legal systems. This global context tends to exacerbate access-to-justice problems in transnational disputes and it gives rise to a variety of access-to-justice problems that are distinctive to transnational disputes, such as transnational access-to-justice gaps and transnational access-to-justice conflicts. Third, access to justice should be understood as a global governance problem, not only a domestic governance problem.

These three shifts, in turn, raise important questions that can serve as focal points for three streams of further transnational access-to-justice research. First, beyond the access-to-justice problems described in this Article, what other access-

131. *Id.*

132. *Id.* at 171. The authors provide two reasons for generally favoring fire-alarm oversight:

> First, legislative goals often are stated in such a vague way that it is hard to decide whether any violation has occurred unless some citizen or group registers a complaint. Such a complaint gives Congress the opportunity to spell out its goals more clearly-just as concrete cases and controversies give courts the opportunity to elucidate legal principles that would be hard to make precise in the abstract. Second, whereas a fire-alarm policy would almost certainly pick up any violation of legislative goals that seriously harmed an organized group, a police-patrol policy would doubtless miss many such violations, since only a sample of executive-branch actions would be examined.

Id. at 171-72.

133. These fire alarms may also enhance the legitimacy of global governance. *See* Kal Raustiala, *Police Patrols and Fire Alarms in the NAAEC*, 26 LOY. L.A. INT'L & COMP. L. REV. 389, 409 (2004) ("The use of a fire alarm may also enhance the legitimacy of [global governance] by enhancing public participation. Citizen participation is a mantra of many advocates of good global governance.").

to-justice problems are faced by parties in transnational disputes? What are the sources of these transnational access-to-justice problems? How does the global legal system contribute to them?

This first stream of research leads to a second, focused on how to mitigate transnational access-to-justice problems. For example, how can private international law ("conflict of laws")—including its rules governing jurisdiction, forum of necessity, choice of law, and the recognition and enforcement of foreign judgments—be reformed to better facilitate transnational access to justice and reduce the number of transnational access-to-justice gaps? How can private international law responses to parallel litigation—such as *lis pendens* stays, antisuit injunctions, and first-to-file rules—be improved to better resolve transnational access-to-justice conflicts?[134]

Furthermore, how can public international law help mitigate transnational access-to-justice problems? What are the prospects for the continued development of a customary international legal right to access to justice in transnational disputes? How might international legal principles that interfere with transnational access to justice—like foreign sovereign immunity—evolve in ways that can better accommodate it?[135]

This Article's analysis also implies a third stream of research that explores how the institutions of global governance—including international courts and international organizations—can more effectively promote transnational access to justice.[136]

By emphasizing transnational access to justice, this Article in no way intends to downplay the importance of domestic access to justice. Both aspects of access to justice are important. Bringing transnational access to justice into the broader research agenda on access to justice will provide a more complete picture of access to justice and give needed attention to the distinctive challenges faced by persons in transnational disputes.

134. One important effort in this direction merits special attention: the American Association of Private International Law's (ASADIP) Principles on Transnational Access to Justice, discussed above, contain a number of principles that, if implemented, promise to improve transnational access to justice—including rules on equal treatment of foreign nationals (art. 2.1), *forum necessitatis* (art. 3.10), the recognition and enforcement of foreign judgments (chap. 7), as well as its general principle that "[e]ach state shall establish and apply its rules of procedure, seeking to ensure maximum respect for human rights, in particular, the right to access to justice." *See* AM. ASS'N OF PRIV. INT'L L., *supra* note 5. In addition, recent scholarship comprehensively surveys the relationship between private international law and human rights law in Europe in ways that highlight the potential of private international law to improve access to justice. *See* FAWCETT, SHÚILLEABHÁIN & SHAW, *supra* note 5.

135. *See, e.g.*, Whytock, *Foreign State Immunity*, *supra* note 41, at pt. IV (proposing changes to foreign sovereign immunity doctrine to better accommodate access-to-justice concerns).

136. One important proposal along these lines is for the establishment of an international court of civil justice. *See* STEINITZ, *supra* note 40.